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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1959.

No. 845 67

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S. DAVID FRIEDMAN and JOSEPH R. FRIEDMAN,

Appellants,

vs.

THOMAS J. GIBBONS, Commissioner of Police of the City of Philadelphia, and VICTOR H. BLANC, District Attorney of the City of Philadelphia,

Appellees.

On Appeal from the Final Order of a Three-Judge Court Sitting in the Eastern District of Pennsylvania Pursuant to 28 U. S. C. §2281 et seq.

JURISDICTIONAL STATEMENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1959.

No. ——

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S. DAVID FRIEDMAN and JOSEPH R. FRIEDMAN,

Appellants,

vs.

THOMAS J. GIBBONS, Commissioner of Police of the City of Philadelphia, and VICTOR H. BLANC, District Attorney of the City of Philadelphia,

Appellees.

ON APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE COURT SITTING IN THE EASTERN DISTRICT OF PENNSYLVANIA PURSUANT TO 28 U. S. C. §2281 ET SEQ.

JURISDICTIONAL STATEMENT.

A.

OPINIONS DELIVERED IN COURT BELOW.

The final order of the three-judge court, filed on Decem ber 16, 1959, dismissing the plaintiff's amended complai has not been reported and is annexed hereto as Appendi A, *infra*. Appendix B, *infra*, is the opinion of Decembe 1, 1959, and certain supplementary Findings of Fact date December 7, 1959, of another specially constituted thre judge court of this district in *Two Guys From Harriso Allentown, Inc. v. McGinley*, No. 25626 (E. D. Pa. 1959 and referred to in the final order of the court in the insta case.

B.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED.

The jurisdiction of this Court is invoked under 28 U. S. C §§1253, 1291 and 2281 *et seq.*, the appeal being from a fin order (entered on December 16, 1959) of a three-judg court which refused a permanent injunction sought by ap pellants on the ground that the state statute hereinafte referred to conflicted with the United States Constitutio and dismissed their Complaint. *Query v. United States*, 3 U. S. 486, 490-91 (1942); see also *Lee v. Roseberry*, 200 F. 2 155, 156 (C. A. 6th, 1952); *cf. Radio Corp. of America United States*, 341 U. S. 412 (1951).

The notice of appeal to this Court was filed on Februa 11, 1960, in the United States District Court for the Easte District of Pennsylvania.

C.

STATUTES INVOLVED.

This litigation involves the validity of the Pennsylvania act of August 10, 1959, which provides:

> "Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.
>
> "Each separate sale or offer to sell shall constitute a separate offense . . ." P. L. No. 212, 18 Purd. Pa. Stat. Ann. § 4699.10.

The Federal Constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States, including the equal protection and due process clauses of the latter Amendment.

D.

QUESTIONS PRESENTED.

1. Whether the enforcement of the Pennsylvania Act of August 10, 1959, against retailers whose religion forbids them from engaging in work and commercial activity, personally or through others, on Friday evening and Saturday, and who are in competition with other retailers who operate their businesses on Friday evening and Saturday, *interferes with their free exercise of religion*, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, where the loss of business resulting from such enforcement will put such retailers to the choice of either giving up their faith, or

(a) substantially reducing their ability to earn a livelihood (in the case of four of the appellants), or

(b) going out of business and losing a substantial capital investment (in the case of one of the appellants).

2. Whether the enforcement of the Pennsylvania Act of August 10, 1959, against retailers whose religion forbids them from engaging in work and commercial activity, personally or through others, on Friday evening and Saturday, and who are in competition with other retailers who operate their businesses on Friday evening and Saturday, *hinders Orthodox Judaism in its ability to compete for adherents with other sects*, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, where the loss of business resulting from such enforcement will put such retailers to the choice of either giving up their faith, or

(a) substantially reducing their ability to earn a livelihood (in the case of four of the appellants), or

(b) going out of business and losing a substantial capital investment (in the case of one of the appellants).

3. Whether the Pennsylvania Act of August 10, 1959, and the enforcement thereof, violate the proscription against an establishment of religion in the due process clause of the Fourteenth Amendment to the United States Constitution by preferring certain religious sects and by protecting certain religious sects without offering the same protection to other religious sects.

4. Whether the Pennsylvania Act of August 10, 1959 is arbitrarily selective in the commodities and businesses affected in violation of the equal protection or due process clause of the Fourteenth Amendment to the United States Constitution.

E.

STATEMENT OF THE CASE.

Appellants, plaintiffs below, instituted a suit seeking a permanent injunction restraining the enforcement of the Pennsylvania Act of August 10, 1959, P. L. 212, 18 Purd. Stat. §4699.10, hereinbefore set forth.

The court below was convened pursuant to section 2281 *et seq.* of Title 28, U. S. C. A motion to dismiss was filed and a consent decree, temporarily restraining enforcement of the Act, was entered. On December 7, 1959 the complaint was dismissed and the temporary restraining order was dissolved. On December 10, 1959 permission to file an amended complaint was granted, and such a complaint was thereafter filed by appellants.

Their amended complaint alleged in part that:

"* * *

"5. Each of the aforesaid plaintiffs is the owner and operator of a store within the City of Philadelphia which sells at retail certain goods, specifically: Abraham Braunfeld owns and operates a retail store at 327 South Street at which he sells clothing and wearing apparel for children; plaintiff Isaac Friedman owns and operates a retail store at 759 South 4th Street at which he sells home furnishings, to wit, draperies and slip-covers; Alter Diament owns and operates a retail store at 763 South 4th Street at which he sells home furnishings, to wit, draperies and slipcovers; S. David Friedman and Joseph R. Friedman own and operate a retail store at 2247 E. Williams Street at which they sell wearing apparel, to wit, shoes.

"* * *

"8. Each of the plaintiffs herein is an observant and Orthodox member and adherent of the Jewish faith. The laws of said faith, particularly the Fourth Commandment of the Decalogue, require a total abstention from business and all manner of work from nightfall Friday until nightfall Saturday each week, this period constituting the Sabbath of the Jewish religion; and forbid its adherents to hire other employees regardless of the faith of such employees, to work during this same period.

"9. The foregoing religious requirement of Sabbath observance occupies a central and primary position in the scheme of religious observances of Orthodox Judaism, and one who does not observe the Sabbath in the manner set forth cannot be an Orthodox Jew.

"10. Each of the plaintiffs herein always has abstained, and at the present time continues to abstain from business and all manner of work on the said Jewish Sabbath and keeps his store regularly closed during that period.

"12. The plaintiffs have heretofore kept their places of business open on Sunday. If they continue to do so, they will subject themselves to prosecution under the said statute, unless such prosecution is enjoined by this Court and the statute is declared unconstitutional.

"13. In the general business area in which the plaintiffs do business, the night and day which the plaintiffs voluntarily stay closed because of their religious convictions, to wit, Friday night and Saturday, are the night and day of the week on which the greatest volume of business is done by plaintiffs' competitors.

"14. The volume of business which each of the plaintiffs does on Sunday is substantially less than the volume of business which each of the plaintiffs would do if he stayed open on Saturday or on Friday night and Saturday.

"15. Each of the plaintiffs does a substantial amount of business on Sundays, and the ability of the plaintiffs to earn a livelihood will be greatly impaired by closing their business establishment on Sundays.

"16. Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment."

Plaintiffs averred that the Act violated the United States Constitution in the particulars set forth hereinbefore (see Questions Presented).

Appellees, defendants below, moved to dismiss the amended complaint on the grounds that (a) no substantial federal question was presented; (b) no claim was stated against defendants upon which relief could be granted; and (c) the Act was constitutional on its face.

On December 16, 1959, the three-judge statutory court below dismissed the amended complaint, and held that the

instant case came within the legal ruling in *Two Guys from Harrison-Allentown, Inc. v. McGinley*, No. 25626, decided on December 1, 1959 by another statutory court of the same district.

Unlike the *Two Guys from Harrison-Allentown, Inc. v. McGinley* case, *supra* (in which case an appeal to this court has been taken, October Term, 1959, No.), the appellants here are Sabbath-observing Jews who are in open competition with others who operate on Friday nights and Saturdays. Thus, in addition to those constitutional problems which the two cases have in common, the enforcement of the statute against the appellants in the instant case raises certain constitutional questions which are dissimilar to those raised in *Two Guys from Harrison-Allentown, Inc. v. McGinley, supra.*

During the course of the proceedings below, the Pennsylvania Retailers' Association was granted leave to intervene as a party defendant, and the following organizations were granted leave to appear as *amicus curiae* and filed briefs in support of Appellants:

East Pennsylvania Conference of Seventh Day Adventists

Rabbinical Association of Philadelphia

Philadelphia Board of Rabbis

Jewish Community Relations Council of Philadelphia, representing thirty-one Jewish communal organizations

F.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL, WERE WRONGLY DECIDED BELOW, AND ARE OF GREAT PUBLIC IMPORTANCE.

I.

Enforcement of the statute will tend to compel Sabbatarian retailers to abandon their faith.

The establishment and the free exercise clauses have been and still are the focal points of considerable controversy and litigation. But if there is any area of agreement about the meaning of those very controversial constitutional guarantees, it is that no state may pass legislation tending to compel its residents to give up their religion (see *McCollum v. Bd. of Education*, 333 U. S. 203, 210-211 (1948)), absent a clear and present danger (compare *Jacobson v. Massachusetts*, 197 U. S. 11; *Reynolds v. United States*, 93 U. S. 145; *Chaplinsky v. New Hampshire*, 315 U. S. 568; *Prince v. Massachusetts*, 321 U. S. 158; *Davis v. Season*, 133 U. S. 333). This Blue Law, applied to these appellants, does just that, and this is the only Blue Law case now or ever before this Court presenting such facts.

Appellants and others like them voluntarily assume a competitively disadvantageous position by closing their retail businesses on what have become the best business night and the best business day of the week. They do so because the Fourth Commandment of the Decalogue compels them to, and they cannot remain Orthodox Jews if they do not "remember the Sabbath day to keep it holy" by this kind of Sabbath observance. Unlike some other Sabbatarian business men—unlike the kosher butchers in *Friedman v. New York*, 341 U. S. 907 (1951), whose competitors like-

wise closed on the Jewish Sabbath—the appellants here are in open competition with other retailers who do stay open on Friday nights and Saturdays. If appellants are forced to close *on the only day of the weekend on which they have until now been open*, many or most of their Sunday customers will buy elsewhere, on Friday nights and Saturdays. The consequent economic pressure of the State statute upon appellants to abandon the Fourth Commandment and thereby Orthodox Judaism, is obvious. Compare *Murdock v. Pennsylvania*, 319 U. S. 105 (1943).

It is this element of compulsion to give up one's religious faith which distinguishes this case from *Friedman v. New York, supra*, in which an appeal to this Court was dismissed for want of a substantial federal question.

Furthermore it is clearly the statute which is the primary cause of such baneful results, rather than appellants' religion. Appellants and those of similar religious persuasion have until now been able to keep their faith and survive in the business world, even though their day of rest and our society's best shopping day coincide. There may be increasing pressures toward social conformity, but our still complex, culturally pluralistic people have always been able to accommodate the persevering Sabbatarian. *It is the statutory compulsion—the power of government—that makes the difference.* Perhaps in acknowledgment of that fact, many of the twenty-four states which have enacted Sunday Closing Laws have provided exemptions for those who observe another day of rest.*

If the determination of the free exercise issue requires in any way a balancing of the rights of the individual and the dangers to society, then the extent of the economic loss

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* Mich. Stat. Vol. 13, §18.855; Conn. Gen. Stat., §8609 (1949); Ind. Stat. Ann. Ch. 43, §10-4301 (Burns 1933); Iowa Code Ann. Ch. 729, §1; Ill., Smith-Hurd Ann. Stat., Ch. 38, §549; Ohio Gen. Code Ann., §13045 (Page's); Kentucky Stte. 436.160 (1903); Okla. Stte. tit. 21, §909 (1951); Maine Laws, Ch. 121, §360; Va. Code, §18830 (1950); W. Va. Code Ann., §6073 (1943); Wis. Stte., §351.52.

o the appellants resulting from the enforcement of the tatute becomes a decisive consideration. For the pressure -State pressure—upon them to give up their religion can e measured only by the extent of the economic loss re-ulting from the additional competitive disadvantage they re put to when they are deprived of the only remaining ay of the weekend.

Thus, one of the appellants will go out of business if the tatute is enforced against him, and the others will sustain erious economic loss over and above that which they vol-ntarily assumed by remaining faithful to their religious bligations. *Counsel has no way of knowing what per-entage of Sabbatarians situated like appellants would con-nue to suffer the economic loss and what percentage would stead quietly give up the faith that until now has been eirs. But the pressure, the compulsion, is there. They n, of course, go out of business and continue to worship d believe as did their fathers without further interfer-ce by the State, and some would undoubtedly do just at. But was the First Amendment meant to protect only e staunch?* And even so far as such faithful souls are ncerned, can they constitutionally be compelled to pay ch a price?

II.

nforcement of the statute against Sabbatarian retailers will place Sabbatarian faiths at a serious disadvantage in their competition with other sects.

In *Zorach v. Clauson*, 343 U. S. 306 (1952) (decided after iedman v. New York, supra) this Court said that the tes must let each religion "flourish according to the zeal its adherents and the appeal of its dogma". This is the sence of religious freedom—free competition between ts. "The government must be neutral when it comes to

competition between sects." *Zorach v. Clauson, supra.* The majority of sects observe Sunday; others, in direct competition with them for adherents, observe Saturday as their day of rest. *Is the government keeping its hands off this competition when it selects one of those two days as the* STATE'S *day of rest? And when a Sabbatarian retailer who must observe both his own and the State's day of rest, is unable to operate at any time during the entire weekend, is his faith being permitted to "flourish according to the zeal of its adherents and the appeal of its dogma"?* This is the element present in the instant case and absent in *Friedman v. New York, supra,* where this Court's decision could not have had any effect on the ability of the faith involved, Orthodox Judaism, to compete for adherents. Here, the continued enforcement of the statute on Orthodox Jewish retailers will obviously affect the ability of that faith to compete with other sects—particularly other Jewish sects.

III.

The statute prefers and protects non-Sabbatarian Christianity, and is clearly violative of the establishment clause.

If the enforcement of the statute tends to compel Sabbatarian retailers to give up their faith, and puts Sabbatarian faiths at a disadvantage in the competition between sects, the law should be declared unconstitutional as infringing upon free exercise regardless of whether the statute is a religious measure, unless appellees can establish, after a hearing, that there is a clear and present danger to society which would justify such an impairment of religious liberty. *Thomas v. Collins,* 323 U. S. 516 (1945). But this case is much stronger than that, because the Court below relied upon the decision in *Two Guys from Harrison-Allentown, Inc. v. McGinley, supra,* where it was said:

"We think it cannot be seriously questioned that in their relation to the first day Sabbath as an institution of Christianity the New York and Pennsylvania statutes have a common background and were in original conception designed to the same end. Moreover, the involvement of religious considerations appears clearly on the face of the basic statute in both states." (Appendix B, *infra*, p. 26.)

IV.

Conclusion.

Thus, what is so clearly involved in the enforcement of the statute is

(a) the preference of certain Christian sects and the protection of those sects by the State, which is not affording similar protection to other Christian and Jewish sects (see *Crown Kosher Super Market v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), now pending before this Court);

(b) the serious hampering of the ability of Sabbatarian faiths to compete with other faiths for adherents;

(c) very substantial economic pressure upon the individual Sabbatarian retailer to give up his faith or his business.

The rights involved are basic to the existence of a free society, and the substantiality of the federal questions would be obvious, but for the decision of this Court in *Friedman v. New York, supra*, that no substantial federal question was there involved. The basic distinction between that case and this has been discussed above. Enforcement of the New York law against the appellants in that matter

did not result either in pressure upon the appellants to give up their faith or in a competitive disadvantage to Orthodox Judaism in competition between sects. Further, the concept of free competition between sects was first set forth by this Court *after Friedman v. New York* was dismissed. *Zorach v. Clauson, supra.* Nor did the lower court in *Friedman v. New York* admit that the law involved was meant to protect Christianity, as did the court in *Two Guys from Harrison-Allentown, Inc. v. McGinley, supra.*

Lastly, doubt recently cast upon the constitutionality of this and similar statutes by members of the United States Courts of Appeal makes a review of the whole question by the highest Court in the land desirable. Judges Goodrich and Hastie, of the Court of Appeals for the Third Circuit, said in a *per curiam* opinion dated December 28, 1959:

> "If the question involved in this case came to us as one of first impression we should find great difficulty in upholding the constitutionality of the legislation in question here."
>
> *Bargaintown, U.S.A., Inc., et al. v. James R. Whitman, et al.* (M. D. Pa. 1959, Civil Action #6760).

Judge Hastie, in *Two Guys from Harrison-Allentown, Inc. v. McGinley, supra,* said:

> "If the view of the establishment of religion question thus authoritatively established by the Supreme Court is to be changed it is for that Court, not an inferior court, to do so."

And Judge Magruder, in *Crown Kosher Super Market v. Gallagher,* 176 F. Supp. 466 (D. Mass. 1959), which is now pending before this Court, struck down the Massachusetts Blue Law statute as applied to the Sabbatarians there involved.

For all of the foregoing reasons, appellants submit that

the federal questions involved are substantial, were wrongly decided below, and are of great public importance.

Respectfully submitted,

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Dated: April 5, 1960.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 26945.

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S. DAVID FRIEDMAN and JOSEPH R. FRIEDMAN,

Plaintiffs,

v.

THOMAS J. GIBBONS and VICTOR H. BLANC,

Defendants.

Present: HASTIE, *Circuit Judge;* GANEY, *Chief District Judge;* and EGAN, *District Judge.*

FINAL ORDER DISMISSING AMENDED COMPLAINT.

[Filed December 16, 1959]

This cause having been submitted on the Amended Complaint and defendants' motion to dismiss that complaint;

and this court finding itself in full accord with the reasoning and conclusions of another statutory court of this district in *Two Guys From Harrison-Allentown, Inc. v. McGinley*, No. 25626, decided December 1, 1959, concerning the constitutionality of Pennsylvania Act No. 212, approved August 10, 1959, prohibiting retail selling of enumerated commodities on Sunday; and the court finding nothing in the Amended Complaint herein to make the legal ruling in the aforesaid case No. 25626 inapplicable; it is this 16th day of December, 1959,

ORDERED that the complaint herein seeking a permanent injunction against the enforcement of Pennsylvania Act No. 212, approved August 10, 1959, be and it is hereby dismissed.

/s/ WILLIAM H. HASTIE,
Circuit Judge.
/s/ J. CULLEN GANEY,
Chief District Judge.
/s/ THOMAS C. EGAN,
District Judge.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 25626.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Plaintiff

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA,
Defendant

Before: HASTIE, *Circuit Judge;* WELSH, *Senior District Judge;* and LORD, *District Judge.*

OPINION.

[Filed December 1, 1959]

By HASTIE, *Circuit Judge.*

This case has been tried to a statutory three-judge court constituted as provided in Sections 2281 and 2284 of Title

28, United States Code. The plaintiff, Two Guys From Harrison-Allentown, Inc., seeks an injunction to prevent the District Attorney of Lehigh County from enforcing against its employees, and thus against its retail selling business, the criminal sanctions of the Pennsylvania Sunday closing laws, sometimes called the Sunday "blue laws". Continuously since 1957 plaintiff has operated a large department store, employing some 300 persons, in a suburban area near the City of Allentown in Lehigh County. This store opens for business on Sunday as well as on the other six days of the week. About one-third of its business is done on Sunday.

The pleadings allege and the evidence establishes as a fact that, prior to a 1959 amendment of the "blue laws", the defendant had undertaken to enforce against the plaintiff's business and its employees the general provision of the Act of June 24, 1939, P. L. 872, §699.4, 18 P. S. §4699.4 that "whoever does or performs any wordly employment or business whatsoever on the Lord's day, commonly called Sunday (works of necessity and charity only excepted) . . . shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of four dollars . . . ." It is also alleged and appears as a fact that the defendant is now threatening to enforce against the plaintiff's business and employees Section 699.10 as added to the Sunday closing law by the Act of August 10, 1959, P. L. 212, 18 P. S. §4699.10, which reads as follows:

> "Whoever engages on Sunday in the business of selling, or sells, or offers for sale on such day at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business, or office furnishings, household, business, or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall upon conviction thereof in a summary proceeding for the first offense be sen-

tenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.

"Each separate sale or offer to sell shall constitute a separate offense . . . ."

The evidence does not show and the court does not find any present or continuing threat to enforce against plaintiff's retail selling the above quoted provision of the 1939 statute, although the defendant has expressed the legal view that both the old Section 699.4 and the new Section 699.10 apply to the situation of the plaintiff.

In these circumstances a question arises at the outset which affects the scope of proper present inquiry. Since the 1959 amendment has made the retail sale of specific categories of merchandise on Sunday a wrong punishable by a fine of one hundred dollars, does the sale of such merchandise continue to be punishable by a fine of four dollars under the older general prohibition of "worldly employment or business on Sunday"?

The 1959 enactment says nothing about the earlier general prohibition although it was enacted as an amendatory addition to Section 699 of the Penal Code in which the earlier prohibition appears. We think it can reasonably be argued that the new section supersedes the older one insofar as the latter covered in generality activities now specifically dealt with and more severely punished in the amendatory enactment. *Cf. Commonwealth v. Brown*, 1943, 346 Pa. 192, 29 A. 2d 793; *Commonwealth v. Gross*, 1941, 145 Pa. Sup. 92, 21 A. 2d 238. In any event, here is a substantial unsettled question concerning the construction of the questioned state legislation. When the Pennsylvania courts decide this question they may well resolve it by an interpretation which will relieve the plaintiff and those associated with it of any punitive action under the 1939 statute.

In such a situation it is our duty to refrain from passing upon the constitutionality of the 1939 statute until the state courts have made clear whether it applies at all to the plaintiff since the 1959 amendment. *Harrison v. N. A. A. C. P.*, 1959, 360 U. S. 167; *Spector Motor Service v. McLaughlin*, 1944, 323 U. S. 101; *Railroad Commission v. Pullman Co.*, 1941, 312 U. S. 496. Even if the statute were clear, a court of the United States should, as a matter of policy to minimize interference with state action, refuse gratuitously to pass on the constitutionality of a provision of a state law when the plaintiff cannot show present urgent need for federal intervention to prevent actual or imminently threatened deprivation of constitutional right. Plaintiff is in no such jeopardy now under the 1939 statute. In these circumstances we think it inappropriate to pass upon the constitutionality of the 1939 statute at this time or even, as was done in the cases cited above, to hold the case *sub judice* pending an interpretative state ruling. It is enough to say that our disposition of the present case shall not bar future resort to this court by the plaintiff if and when the state courts shall authoritatively decide that the 1939 statute still applies to selling which is covered by the 1959 amendment, and if and when plaintiff's business shall be jeopardized by a present threat of prosecution under the 1939 statute. The present adjudication will concern the 1959 amendment only.

Plaintiff attacks the Pennsylvania legislation commanding the cessation of certain worldly activity on Sunday as state action promoting "an establishment of religion" contrary to the prohibition of the First Amendment, as made applicable to the states by the Fourteenth Amendment. The argument is that this required cessation of business on Sunday is an enforced expression of respect for and acknowledgment of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the resurrection of Christ. There is testimony which establishes as a fact in this record that this view of the religious significance of enforced Sunday work

stoppage is sincerely held by many persons whose religion does not recognize the divinity or resurrection of Jesus of Nazareth or the sacredness of Sunday as the "Lord's day".

At the outset we consider a contention that this First Amendment argument has been foreclosed by authoritative determinations of the constitutionality of Sunday laws essentially similar to the Pennsylvania statute. At the turn of the century, before the Supreme Court had ruled that the First Amendment guarantees are enforceable through the Fourteenth Amendment against the states,[1] Sunday "blue laws" were upheld in two familiar decisions of the Court. *Hennington v. Georgia*, 1896, 163 U. S. 299; *Petit v. Minnesota*, 1900, 177 U. S. 164.[2] If these stood alone their present authority would be questionable in the light of the development of constitutional concepts during this century. But more recently a new test of the constitutionality of Sunday legislation was sought in an appeal to the Supreme Court from a conviction under the New York Sunday laws. *Friedman v. New York*, 1951, 341 U. S. 907. In the jurisdictional statement filed in the Supreme Court in support of that appeal the appellant said: "The question to be resolved is an important one: Are *Hennington v. Georgia* and *Petit v. Minnesota* still law in view of the *Everson* and *McCollum* decisions"? Accordingly, it is appropriate that we examine that case carefully.

The defendants in the *Friedman* case, who were Orthodox Jews, had been convicted of the retail selling of kosher meat on Sunday in violation of the New York prohibition

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[1] The ruling as to freedom of religion was first made in 1940 in **Cantwell v. Connecticut**, 310 U. S. 296, 303, although first foreshadowed fifteen years earlier. **Gitlow v. New York**, 1925, 268 U. S. 652.

[2] See also the earlier dictum in **Soon Hing v. Crowley**, 1885, 113 U. S. 703, 710: "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor."

against "all manner of public selling [except for many miscellaneous exemptions] . . . upon Sunday . . . ." 39 N. Y. Consol. Laws, McKinney, 1944, §2147. The defense was carefully planned and organized under the direction of Leo Pfeffer, Esquire, a distinguished advocate and legal writer who had specialized in the field of religious liberty.[3] Before the Supreme Court the appellant's very explicit statement of "Questions Presented" read in part as follows:

> "1. Whether the New York Sabbath Law (Article 192 of the New York Penal Law) is a law respecting an establishment of religion and is, therefore, invalid in its entirety under the First Amendment to the United States Constitution which is made applicable to the States by the Fourteenth Amendment.
>
> "2. Whether the New York Sabbath Law is constitutionally invalid as violative of the freedom of religion provision of the United States Constitution, because it fails to exempt from its operations persons whose religious convictions compel them to observe a day other than Sunday as their holy day of rest.
>
> "3. Whether the New York Sabbath Law by reason of its 'crazy quilt' pattern of inclusions and exclusions is arbitrary and discriminatory and therefore violative of the 'equal protection of the law' and 'due process' provisions of the United States Constitution."

Of course these points were appropriately elaborated. Moreover, they had been raised at trial and had been considered and decided against the defendants by the highest court of New York. *People v. Friedman*, 1950, 302 N. Y. 75, 96 N. E. 2d 184. Indeed, Mr. Pfeffer points out in his book, and his submission must have made it plain to the Supreme Court, that this was essentially a test case to

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[3] **Pfeffer's Church, State, and Freedom,** 1953, discusses Sunday laws in general and the **Friedman** case in detail at pages 227-241.

determine the vitality of the doctrine of the *Hennington* and *Petit* cases in the light of contemporary understanding of the reach of the First and Fourteenth Amendments. There can be no question but that the Supreme Court was plainly urged to find in the New York law the very constitutional infirmities we are now asked to find in the Pennsylvania law. Yet, without permitting oral argument the Court disposed of the case in a per curiam opinion dismissing the appeal and saying merely: "The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question." 341 U. S. 907. In these circumstances the *Friedman* case seems to mean that in the Supreme Court's view such legislation as the New York law is so clearly invulnerable to First and Fourteenth Amendment attack that it would not even be useful to permit further argument of the matter.[4]

In effect, the Court was content to leave as the law of the land its old reasoning that "the legislature having . . . power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it

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[4] As early as 1902 the Supreme Court recognized the stare decisis effect of its per curiam disposition of cases properly appealed to it. **Fidelity & Deposit Co. v. United States,** 1902, 187 U. S. 315, 319. In more recent times this point has become important in the administration of the Court's rules and procedure which require that an appeal of right from a state court be supported by a jurisdictional statement, stating "the reasons why the questions presented are so substantial as to require plenary consideration . . . ." Rule 15, par. 1(e), 346 U. S. 962. If that showing is insufficient or unpersuasive a per curiam dismissal for want of a substantial federal question or a summary affirmance of the judgment below follows. Unless such a dismissal is grounded in some procedural or technical insufficiency of appellant's presentation, its meaning seems to be that the disposition of the federal question by the state court was clearly right. In essence, such a per curiam is likely to be a particularly emphatic ruling on the merits of the question. The Court itself has explicitly recognized such summary rulings as authoritative precedents. **Baskin v. Industrial Accident Commission,** 1949, 338 U. S. 854; **North Coast Transportation Co. v. United States,** 1944, 323 U. S. 668. See also the statement of Mr. Justice Brennan, concurring in **Eason v. Price,** 1959, 360 U. S. 246, 247, that, "votes to affirm summarily and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . . ."

was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed. . . ." See *Hennington v. Georgia, supra*, at 304.

As an inferior court asked to hold unconstitutional the Pennsylvania laws prohibiting certain Sunday retail selling, we can escape from the obligation to apply the ruling in the *Friedman* case only if the Pennsylvania law is so significantly different from the New York law that a different result can be reached and justified without departing from the legal view for which the *Friedman* case stands.

It has been suggested that the New York law differs significantly from the Pennsylvania law in two respects. First, the aim to protect the Christian Sabbath from profanation is said to be much plainer in Pennsylvania than in New York. In this connection, the text of the laws, their history and their judicial interpretation all are relevant. The basic Sunday "blue laws" of Pennsylvania, New York and many other states today are derived from colonial and early state statutes which, in turn, had been derived from British laws designed to require observance and to prevent profanation of the Christian Sabbath. A hundred years before the American revolution an English statute prohibited any person from engaging in "worldly labor or business or work of the ordinary calling on the Lord's Day, works of necessity and charity excepted". 1676, 29 Car. II, C. 7. The colonial theocracies, among them both New York and Pennsylvania, adopted markedly similar legislation which they reenacted after they became states of the United States of America.[*] The basic Pennsylvania statute as it has come down to us in Section 699.4 of the codification of 1939, with its prohibition of "worldly employment or

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[*] See the summary of the evolution of legislation against "Sabbath breaking" in New York from colonial times in the dissenting opinion of Judge McCarthy in **Crown Kosher Super Market v. Gallagher**, D. Mass., 1959, 176 F. Supp. 466, 477, 484.

business . . . on the Lord's Day", has already been set out. The New York statute, 39 N. Y. Consol. Laws, McKinney, 1944, §2140 begins with this declaration:

> "The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community."

Pursuant to this declaration the statute prohibits, among other things, "all manner of public selling" except for miscellaneous exemptions. §2147. We think it cannot be seriously questioned that in their relation to the first day Sabbath as an institution of Christianity the New York and Pennsylvania statutes have a common background and were in original conception designed to the same end. Moreover, the involvement of religious considerations appears clearly on the face of the basic statute in both states.

Local judicial interpretation of the two statutes tells the same story. In the case of *People v. Dunford*, 1912, 207 N. Y. 17, 20, 100 N. E. 433, the Court of Appeals declared:

> "That the legislature has the authority to enact laws regulating the observance of the Sabbath day and to prevent its desecration is not, and cannot well be, disputed. The day is set apart by the statute for repose and for religious observance; objects which pertain to the physical and moral well being of the community. As to the acts which should be prohibited, as disturbances, or profanations, of the Sabbath day, the legislature is the sole judge."

Similarly in *People v. Moses*, 1893, 140 N. Y. 214, 215, this language appears:

> "The Christian Sabbath is one of the civil institutions of the state, and that the legislature for the purpose of promoting the moral and physical well-being

> of the people, and the peace, quiet and good order of society, has authority to regulate its observance, and prevent its desecration by any appropriate legislation is unquestioned."

See also *People v. Zimmerman*, 1905, 95 N. Y. S. 136. Finally, in the *Friedman* case itself, the opinion of the New York Court of Appeals, which was submitted to the Supreme Court for review, explicitly recognized the religious origin of the New York statute. 302 N. Y. at 79, 96 N. E. 2d at 186.

We find nothing in the cases discussing the Pennsylvania legislation and its background which makes any plainer the religious considerations which underlie the adoption of the "blue laws" of that state and from time to time have been utilized to justify them. The historical religious connection is so clear in both state statutes as to be obvious and indisputable. It has been stressed that the Supreme Court of Pennsylvania in upholding the local statute had gone so far as to say that "Christianity is part of the common law of Pennsylvania". *Commonwealth v. American Baseball Club of Philadelphia*, 1927, 290 Pa. 136, 138 Atl. 497, 499. But a New York case, *People v. Ruggles*, 1811, 8 Johns 290, went just as far.

Thus, the Supreme Court in the *Friedman* case was faced with very substantial indicia of the statute's relation to religion, strikingly similar to those appellant urges upon us now. We can see no basis for reasoning that the Pennsylvania statute is unconstitutionally related to an establishment of religion without bringing the New York statute under the same interdiction. Yet, the Supreme Court sustained the New York statute summarily. If the view of the establishment of religion question thus authoritatively established by the Supreme Court is to be changed it is for that Court, not an inferior court, to do so. Our conclusion that the *Friedman* case has broad and controlling significance on the issue of establishment of religion is contrary

to the view of the majority of the three-judge district court which recently decided *Crown Kosher Super Market v. Gallagher*, D. Mass. 1959, 176 F. Supp. 466. That opinion disposes of this problem of controlling authority in a brief footnote which is not elaborate enough to make the court's reasoning clear to us. It affords no useful critique of our own analysis which indicates that the *Friedman* precedent is controlling.

As a separate point the plaintiff urges that the 1959 amendment is a denial of equal protection of the laws in that it unreasonably singles out certain types of retail selling for mandatory Sunday closing under heavy penalty—a hundred dollar fine, and twice that on subsequent offenses—while many other kinds of commercial activity are either permitted on Sunday or, if prohibited, subjected only to a very small fine, in most cases only four dollars.

This line of argument against Sunday closing statutes, no less than the First Amendment argument, has a considerable history of Supreme Court adjudication. Indeed, essentially the same argument was made against another provision of the Pennsylvania "blue laws" in *Commonwealth v. Grochowiak*, 1957, 184 Pa. Super. 522, 136 A. 2d 145. The Pennsylvania courts considered and rejected any argument that closing Sunday movies under a fifty dollar penalty while other worldly amusements and activities were permitted, or at least prohibited under the much smaller four dollar penalty, was arbitrary and unreasonable and a denial of equal protection of the laws. The case was taken to the Supreme Court where the appeal was dismissed for failure to present a substantial federal question. 358 U. S. 47. In *State v. Towery*, 1954, 239 N. C. 274, 79 S. E. 2d 513, appeal dismissed 347 U. S. 925, a Sunday seller of general merchandise complained that a North Carolina law prevented him from operating on Sunday yet allowed drug stores to remain open and to sell the same kinds of merchandise. The North Carolina courts sustained the statute and the Supreme Court dismissed the appeal. Similar summary dismissal has been the fate of other recent claims

of arbitrary classification and unreasonable discrimination in the selection of certain businesses and activities for Sunday closing while others, said to be no less objectionable, remained unmolested. *State v. Kidd*, 1957, 167 Ohio St. 521, 150 N. E. 2d 413, appeal dismissed 358 U. S. 132; *Gundaker Central Motors v. Gassert*, 1956, 23 N. J. 71, 127 A. 2d 566, appeal dismissed 354 U. S. 933; *State v. McGee*, 1953, 237 N. C. 633, 75 S. E. 2d 783, appeal dismissed 346 U. S. 802. This point was also involved in the *Friedman* case, which has already been discussed in relation to the establishment of religion issue. Indeed the Fourteenth Amendment argument of arbitrary classification seems to have been made as strongly there as was the First Amendment argument. See Pfeffer, CHURCH, STATE, AND FREEDOM, *supra*, 230-234, 239-240. The New York statute was attacked as a miscellany of pointless, irrational and discriminatory differentiations in the treatment of various Sunday commercial activities. But the Supreme Court was not persuaded that the contention had sufficient merit even to require full argument.

In larger context, cases arising under the Sunday closing laws are but a striking example of the continuing reluctance of the Supreme Court to interfere with even near whimsical classifications when made by state legislatures in the selection of schemes or areas or subject matter for economic regulations. *Cf. Williamson v. Lee Optical of Oklahoma, Inc.*, 1955, 348 U. S. 483; *Kotch v. Board of River Port Pilot Commissioners*, 1947, 330 U. S. 552; *Tigner v. Texas*, 1940, 310 U. S. 141. But *cf. Morey v. Doud*, 1957, 354 U. S. 457. While *Morey v. Doud*, indicates that the Supreme Court will still strike down what it views as the most patently arbitrary of economic classifications we cannot ignore the fact that no Sunday law has seemed to the Court to raise even a substantial question in this area.

Moreover, in the case of the 1959 amendment of the Pennsylvania law, the circumstances attending or existing at the time of its enactment affirmatively suggest a rational basis for this legislative action. In the present record it

appears and we find that the 1939 closing law was observed by most retail sellers in Lehigh County, though not all, who were subject to its provisions, until the very recent opening of substantial suburban retail businesses like that of the plaintiff initiated and triggered new and rather large scale violations, and threats of others. It also appears in the testimony which is part of the legislative hearing on the bill which became the 1959 amendment of the Sunday closing law, that the small four dollar penalty of the earlier law was inadequate to deter the Sunday opening of large retail establishments which could easily absorb such small fines as an incidental cost of doing a profitable business. Moreover, it appeared that the types of commodities covered by this new enactment are principal categories of merchandise sold in these establishments which have made the problem of Sunday retail selling newly acute. It is probable that such considerations influenced the legislature's 1959 decision to make Sunday retail selling the subject of a new prohibitory enactment. In such circumstances we find it impossible to believe that the Supreme Court would treat this case as significantly different from those in which it has dismissed appeals for want of a substantial federal question.

Finally, it is argued that because the general prohibition in the 1939 statute against worldly activity on Sunday has for a long time not been enforced strictly or at all against many worldly Sunday activities, it is a denial of equal protection of the law to enforce the new 1959 prohibition against the Sunday retail sale of specified kinds of merchandise. On this point the evidence is clear and we find as a fact that in Lehigh County numerous commercial and recreational activities covered by the general prohibition of the 1939 statute have long been conducted openly on Sunday, and continue, without molestation or direction to desist by the defendant or by any public officer. On the other hand, beginning in 1957 and thereafter the defendant made substantial and frequent efforts by admonition and arrest to compel the Sunday closing of numer-

ous retail stores, including plaintiff's store. This court temporarily restrained the enforcement of the 1959 statute against the plaintiff within a week after its enactment. Since that time enforcement of the "blue laws" in Lehigh County has been held in abeyance. In these circumstances, the court finds no sufficient basis for a finding as to the future pattern or procedure of enforcement of the new statute if and when judicial restraint shall be removed. The impracticability of such an anticipatory finding is made the more obvious by the fact, of which we take judicial notice, that the term of office of the defendant as District Attorney expires at the end of the calendar year 1959. Thus, on the present record we have the threat of the enforcement of the 1959 act against retail selling while many other kinds of worldly activity proscribed by the 1939 laws have continued and are likely to continue without any interference by the public authorities. Is this such a discrimination as denies equal protection of the laws?

It may well be a violation of public duty under state law for local public officers to ignore widespread violations of the 1939 law. But it does not follow that the enforcement of the 1959 statute denies the Sunday selling retailer due process of law. The controlling constitutional principle is that such selective or discriminatory behavior by administrative officers, though wrongful, is not a violation of the Constitution unless equivalent action by the state legislature would be unconstitutional. *Snowden v. Hughes*, 1943, 321 U. S. 1; *Owensboro Waterworks Co. v. Owensboro*, 1906, 200 U. S. 38. See also *Hayman v. Galveston*, 1927, 273 U. S. 414, 416. In the situation we now are considering the administrative failure to enforce the 1939 law against certain types of Sunday activity creates a constitutional problem only to the extent that a legislative exemption of these activities from Sunday closing would do so. But we already have pointed out that the Supreme Court has repeatedly treated the fact that a Sunday closing law is a hodgepodge characterized by many and seemingly pointless exceptions and exemptions as insufficient to raise a sub-

stantial federal question. A hodgepodge in enforcement has no greater constitutional significance.[6]

On the whole case, while the court has jurisdiction of the parties and of the subject matter under Sections 1343 and 2281 of Title 28 of the United States Code, the plaintiff has failed to show any violation of the First or the Fourteenth Amendment of the Constitution of the United States. Accordingly, plaintiff is not entitled to relief in this action.

The factual statements and legal conclusions stated in this opinion shall constitute the findings of fact and conclusions of law of the court. An order may be presented dissolving the temporary injunction heretofore entered in this case. A final order and decree may be presented denying plaintiff relief.

The foregoing opinion, which has been approved by Judge Lord, is to be filed together with the separate opinion of Judge Welsh.

sgd. WILLIAM H. HASTIE,
Circuit Judge.

WELSH, *Senior District Judge*, concurring in part and dissenting in part.

It had been my hope after discussing this deep and fundamental problem with my Associates, to arrive at a completely unanimous conclusion. But a conscientious conception of Judicial duty, whether completely warranted or not, requires me to express myself in my own way on this subject.

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[6] In so ruling we in no way detract from the authority of the leading case of **Yick Wo v. Hopkins,** 1886, 118 U. S. 356, where the administrative discrimination practiced against Chinese entrepreneurs would have been no less invidious and constitutionally intolerable if directed by the legislature.

Let me say at the outset that this Court, individually and collectively, has sought to catch the spirit as well as the letter of the various arguments of all concerned. We are all in agreement on the original legislation including that of the Act of 1939. On this religious phase of the subject I can speak from personal experience. Having been born in the late seventies and having lived in an environment and atmosphere of reverence for the Sabbath until I reached my early manhood, I know whereof I speak. That legislation was the outgrowth of deep feelings of all but a microscopic minority. The framers of the Law had gone through a religious experience and a spiritual Renaissance that clearly set before them the evils of excessive worldly pleasures and unbridled seeking and striving for worldly riches. Their principal objective was to minimize the weakening of the spiritual life by too much worldly pleasures. Labor was secondary at that time, secondary, because of the simple habits and custom of the times. Most people did their own labor. There were very few employers having control over large numbers of men. And nearly all labor, such as it was, could be suspended for a day without confusion or without inconvenience to the community.

For over a hundred and fifty years the initial legislation has been on the Statute books. Times and customs have changed, due to the different conditions under which we live. To me it seems almost an entirely different world. It is but natural that great changes should bring about a clamor for modification or repeal of those inhibitions.

An appeal for relief has been made to the Court. Is that the proper Tribunal? After a Statute has been on the books for a hundred and fifty years or more should the Judicial Branch of the Government strike it down or should the appeal for relief be made to the Legislative Branch? Or to the people direct? Having served for many years in both the Judicial and Legislative Branches of the Government I cannot conceive that the Courts have power to make such a decision as we are asked to make in this case

by the plaintiff. In expressing this conclusion I do not want to be understood as not recognizing the increased demand for a change. Sometimes the advocates of the change speak rather harshly of the framers of those laws without an understanding of the motives that prompted their enactment. Often those who resist the repeal of this legislation today, are not entirely unsympathetic with the proponents of repeal. They know that in many respects the law has been a dead letter for many years. But countless thousands of fair minded Americans who truly love God and their neighbor, look upon these laws as something pointing to a spiritual ideal—unrealized it is true—but still an expression of a desire of a great Country and a great people to attain and reach for something higher than the flesh-pots of Egypt or the corroding gold of a Midas.

During the last half century they have seen the struggle against materialism become more and more fierce. They are now seeing mighty nations rising against each other with weapons of annihilation and destruction greater than Satan himself could devise. At home and abroad they see the misery inflicted, and their hearts are troubled. They still feel safer with a declaration of principle expressing hope for an ideal still on the books of this beloved Country. And in this global struggle they just do not want to throw the life preservers overboard to lighten the ship.

That is the way I read the feeling of our people. I am moved to say this in the hope that if both groups can see and feel what is on both sides of this question it will lead to a better understanding and a charitable goodwill on the part of all of us.

For these reasons I concur with the majority opinion in dismissing plaintiff's attack on all legislation prior to 1959.

In construing the Act of 1959 there are other considerations involved. It is frankly admitted by the sponsors of the Act that there is nothing of a religious character or element in the legislation. One can therefore fairly ask, why then should it be tacked on to an Act that was conceived

and cradled in religiosity, if not in religion? The amending Act actually is one to regulate business and to deal with the competition among business men. Such far reaching efforts to regulate the private lives of others should be bottomed on a firm Constitutional foundation, and the need, the necessity, and the evil to be controlled, fully met. We ask: Is it based on public health, public security, public morals, sanitation, water supply, education, or any of the factors that would, standing by themselves be admittedly a basis for the power of the legislature to enact.

I do not want to go over the ground so thoroughly covered by my Associates but I do not find that the legislation has met the test on any of these requirements. We all admit that under our form of Government there are things that the legislature cannot do. The fundamental rights of the people have never been at the unrestricted mercy of a possible unreasonable and arbitrary legislature. MOREY *v.* DOUD, 354 U. S. 457. And in determining whether or not the legislature has kept within the legitimate bounds it is proper for the Courts in construing legislative action to ask these very pertinent questions as stated above.

It is also the duty of the Court to take into consideration the various facts that mark the introduction of the legislation and the events leading up to such introduction. I do not think anyone will seriously argue that there is such a rising tide of spiritual interest in Sunday's observance as to constitute a clamor for more stringent laws to insure the sanctity of the Christian Sabbath. The trend has been quite the reverse. Therefore, why this sudden eruption of Sabbath interest? All the facts leading up to the introduction of this Statute appear in the record and without desiring to be critical they are not particularly wholesome or praiseworthy. (This is no reflection on the County Officials.) High pressured salesmanship, outstanding organizing ability, a fantastic list of prohibited activity, indicate that a single target was the objective and a single purpose to regulate business competition. In addition it was enacted a few months before a highly important State election when

members of the legislature from various parts of the State were put to undue and unreasonable pressure to vote for this legislation, that they would not think of supporting if it was not connected with the Sunday closing. The proponents of the legislation admit this was a helpful feature in getting it passed.

If it is conceded that this legislation is within the power of the legislature to enact, then I cannot conceive of any future legislation that cannot also be passed. We know that far-sighted men are considering the advisability of the four day working week, due to automation and the fear of unemployment. If this Act lies within the power of the legislature to enact, it will be establishing a precedent for drastic curtailment of the right to work in the future.

It is not like the daylight saving legislation, couched in the language of a recommendation or request, but in the language of a command subject to drastic penalty for violation.

This view is entirely too far to the left for me to say that the legislative branch has any such power without a specific grant of authority from the people. I would strike it down.

Sgd. GEO. A. WELSH.

SUPPLEMENTARY FINDINGS OF FACT.

[Filed Dec. 7, 1959]

Present: HASTIE, *Circuit Judge*, WELSH, *Senior District Judge* and LORD, *District Judge*.

Pursuant to the request of plaintiff the court makes the following findings of fact in addition to those already made and stated in the course of the opinion of the court:

1. Sunday is a day designated for religious services and observances by Christians, with the exception of certain Seventh Day Adventists and Baptists. The Christian Sabbath commemorates and honors the Resurrection of Christ. It is marked by a weekly celebration of the same religious event basic to Christianity as is celebrated by Easter.

2. Sunday work at plaintiff's store has no different effect upon the health or welfare of either the employees or customers of the store than does work on any other day.

3. Various Pennsylvania statutes create exceptions to the general statutory prohibition of wordly activity on Sunday, or increase the penalties for conducting activities prohibited thereby. These statutes now make it lawful, despite the general prohibition, to operate a motion picture house after 2:00 P. M. on Sunday if the voters of the municipality so vote by referendum, Act of July 2, 1935, P. L. 599, 4 *Purd. Stat.* §§59-65; to play professional baseball and football after 2:00 P. M. and before 6:00 P. M. on Sunday if the voters of the municipality so vote by referendum. Act of April 25, 1933, P. L. 74, 4 *Purd. Stat.* §§81-87; to

stage musical concerts after 12:00 noon on Sunday when authorized to do so by the Commonwealth's Department of Public Instruction and to compensate musicians participating in such concerts, Act of June 2, 1933, P. L. 1423, No. 308, 4 *Purd. Stat.* §§121-127; to play polo after 1:00 P. M. and before 7:00 P. M. on Sunday unless the voters of the municipality have voted to the contrary by referendum, Act of June 22, 1935, P. L. 446, 4 *Purd. Stat.* §§151-157; to play tennis after 1:00 P. M. and before 7:00 P. M. on Sunday, Act of June 22, 1935, P. L. 449, 4 *Purd. Stat.* §§181-185, provided that the conduct of other sports on Sunday afternoon has been approved by municipal referendum; to fish on Sunday, Act of April 14, 1937, P. L. 312, §1, as amended, 30 *Purd. Stat.* §265; to remove raccoons and fur-bearing animals caught in hunting traps or deadfalls on Sunday, Act of June 3, 1937, P. L. 1225, Art. VII, §702, as amended, 34 *Purd. Stat.* §1311.702; and for a private club, but not a restaurant or hotel, to sell liquor to its members on Sunday, Act of April 12, 1951, P. L. 90, Art. IV, §406, as amended, 47 *Purd. Stat.* §4-406 (pp. 71-72).

4. The fine for the generality of offenses, including the conduct of some games and amusements is $4.00, plus costs that run from two to four times the fine. But for bowling, baseball and football during prohibited hours, it is $10.00, 18 *Purd. Stat.* §4651, 4 *Purd. Stat.* §82; for polo $100, for motion pictures $50.00, for musical concerts $100 to $1,000, 4 *Purd. Stat.* §§152, 65, 127. For persons selling motor vehicles at retail or wholesale, the fine is $100 for engaging in business the first Sunday and $200 thereafter, 4 *Purd. Stat.* §4699.9. For selling motor boats, it is $4.00. For selling an automobile air-conditioner, it is $4.00. For selling a home air-conditioner, it is $100 for each sale at retail, but only $4.00 at wholesale. Sale of slip covers for automobile seats all day Sunday entails a $4.00 fine; the sale of a slip cover for a living room chair at retail entails a $100 fine for the first sale and $200 for each and every sale thereafter.

and for each unsuccessful offer to sell. To sell or offer to sell toys after the first offer is subject to a $200 fine, whereas novelties and souvenirs can be sold for the entire day for the payment of one $4.00 fine. Certain sports equipment is in the $4.00 category, including shoes used in forbidden sports. On the other hand, the sale of a pair of shoes for business wear is in the $100 category.

5. The Commonwealth of Pennsylvania has enacted a pattern of economic laws under the police power regulating hours of work, which operate completely independently of the Sunday laws. They include such statutes as Act of July 25, 1913, P. L. 1024, §3, as amended, 43 *Purd. Stat.* §103(a) (women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, §4, as amended, 43 *Purd. Stat.* §46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, §1, 43 *Purd. Stat.* §361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, §1, 43 *Purd. Stat.* §481 (employees of motion picture theaters must be given one day of rest per week).

6. The enforcement of the Sunday laws against plaintiff's employees, as threatened by defendant, will cause them not to work on Sundays. This will require plaintiff to close its store on Sunday, which is likely to render its entire operation unprofitable.

7. Unless enjoined, defendant will enforce the 1959 statute against plaintiff's employees, thereby causing plaintiff to suffer irreparable harm.

/s/ WILLIAM H. HASTIE,
Circuit Judge.

/s/ GEO. A. WELSH,
Senior District Judge.

/s/ JOHN W. LORD, JR.,
District Judge.